Supreme Court, U.S.
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No. _____

October Term, 1997

In the
Supreme Court
of the
United States of America

Mel Jenkins, Petitioner

v.

Florida Keys Community College, et al.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Petition for Writ of Certiorari

Mel Jenkins, *Pro Se*
PO Box 2525
Key West, FL 33045

42 pp

Questions Presented

(1) Has a district court judge incorrectly applied the federal rules of civil procedure or violated a litigant's due process, when he calls hearings in a venue which he deems more convenient, than the venue prescribed by local court rule and intended for the convenience of litigants?

(2) Has a circuit court incorrectly applied the federal rules of civil procedure, such as rule 8, when it affirms dismissal of a complaint making allegations other than those under Rule 9 [fraud or mistake], because it contains vague or conclusory allegations?

(3) Has a district court judge incorrectly applied the federal rules of civil procedure when he dismisses a plaintiff's complaint for being impossible to answer, though defendants have moved to dismiss, asserting all plaintiff's claims are barred by res judicata?

(4) Has a district court judge incorrectly applied the federal rules of civil procedure, inter alia, rule 8 [short, plain, simple, concise, direct, no technicalities], when he requires a plaintiff making allegations other than those under rule 9 [fraud or mistake], to compose specific claims with specific facts, and cite the elements necessary to substantiate each claim?

(5) Has a district court judge incorrectly applied the federal rules of civil procedure, *inter alia*, rules 1,8, and 10, when he requires claims against each defendant in separate counts, when those defendants are numerous and alleged to be individually liable for the acts of the group, such as a board of trustees, and when those defendants are all represented by the same counsel?

(6) Has a circuit court incorrectly applied the federal rules of civil procedure, *inter alia*, rules 10(b) and (c) [adoption by reference] when it affirms dismissal of a complaint for being redundant?

(7) Has a district court judge incorrectly applied the federal rules of civil procedure when he dismisses a 'complaint' for violating the "short and plain" provision of rule 8(a)(2), or does this provision correctly apply to a 'claim'?

(8) Has a district court judge incorrectly applied the federal rules of civil procedure, *inter alia*, rule 8(e)(2) [state as many claims as you have] when he dismisses a complaint for being too long per se?

List of Parties

Petitioner:

Mel Jenkins

Respondents:

Florida Keys Community College,
Stephanie Monsalvatge,
William Daniels,
B.G. Carter,
Aaron Castillo,
Dale Wolgast,
Patricia Almeda,
Mona Clark,
William Seeker,
William Eldridge,
Maureen Crowley,
Greg O'Berry,
Nelson Read,
William DeVane,
Robert Norton,
Rodolfo Gomez,
Jeffrey Goody.

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No. _____

October Term. 1997

In the Supreme Court of
the United States of America

Mel Jenkins, Petitioner

v.

Florida Keys Community College, et al., Respondent

Petition for Writ of Certiorari

Petitioner Mel Jenkins requests this U.S. Supreme Court issue a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit entered in the above entitled case.

Opinions Below

The judicial opinions to be reviewed in this case are printed in the appendix. This comprises opinions of the United States District Court for the Southern District of Florida, and the U.S. Eleventh Circuit Court of Appeals. Also included in the appendix is are the reports and recommendations of the magistrate judge approved by the district court judge.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), wherein cases may be reviewed by the U.S. Supreme Court via a writ of certiorari granted upon petition of a party to any civil suit after rendition of judgment by a federal courts of appeals. Final judgment of the 11th Circuit Court of Appeals on this case was entered on July 17, 1997.

Constitution, Statutes, Rules Involved

This case considers application of the due process clause of the 5th Amendment to the U.S. Constitution. Also involved are Rules 1, 8-12, 41, and 83, of the Federal Rules of Civil Procedure and Rule 3.1.D. of the Local Rules of the United States District Court for the Southern District of Florida. Statutes involved herein include 28 U.S.C.A. §§ 1254, 1393, 1404, and 42 U.S.C. § 1983.

Statement of the Case

The petitioner in this case is Mel Jenkins, formerly a teacher of computer science at the respondent Florida Keys Community College (FKCC). FKCC is a public college located approximately 150 miles southwest of Miami on an island at Key West, Florida. The teacher's employment was terminated by the college board of trustees in November 1993. The teacher appealed to the District Court of Appeal, Third District of Florida, pursuant to the Florida Administrative Procedure Act. The Florida appellate court affirmed the teacher's administrative termination in October 1994, without opinion.

Three months later, in January 1995, the teacher filed a federal complaint at the Key West Branch of the U.S. District Court for the Southern District of Florida, against the college and several of its officers and agents involved in the termination. Assigned to the case were Judge Shelby Highsmith and magistrate Stephen Brown, whose offices are at the Miami Branch of the Southern District of Florida.

The initial complaint filed by the plaintiff teacher was 20 pages in length, with allegations against 17 defendants in 168 separately numbered counts. The college defendants moved against the initial complaint. They argued among other things that the complaint was unintelligible, insufficiently definite, and that all the teacher's claims were barred by the doctrine of *res judicata*.

The federal district court dismissed the complaint, stating as its reason the:

> rambling nature of the complaint makes it not only impossible for defendants to respond (as they have alleged) but makes it impossible for this court to make a determination as to whether or not the defendant can state a cause of action against any of the defendants.

Dismissing with leave to amend, the district court directed plaintiff to file an amended complaint which:

> shall be composed of specific claims against specific defendants. As to each claim, plaintiff shall cite the basis for the claim, the basis for the court's jurisdiction, the specific facts giving rise to the claim, and the elements necessary to substantiate the claim.

Plaintiff filed an amended complaint 500 pages in length. The magistrate judge called a hearing in Miami on the complaint, the issue being whether it should be stricken for failure to comply with the "short and plain" requirement of Fed.R.Civ.P. 8(a). Plaintiff did not appear at the hearing, later explaining that he was not notified of

the hearing because the U.S. Postal Service failed to deliver the notice to his new address.

The district court called a second hearing in Miami, the issue being again whether the proposed complaint complies with Fed.R.Civ.P. 8(a), and in addition, whether plaintiff should be sanctioned for his failure to notice the court of his new address. Plaintiff moved to stay the hearing and change the venue of subsequent proceedings to Key West. Magistrate Brown and Judge Highsmith both denied the change of venue. Plaintiff did not appear at the second hearing.

The district judge then dismissed the amended complaint without prejudice on March 6, 1996 "For the reasons stated in Magistrate Judge Stephen T. Brown's Report and Recommendation." [See appendix].

The reasons given for final dismissal include plaintiff's failures:

- to notify the court of an alleged address change;
- once again, of appellant to appear at the most recent hearing;
- to timely comply with this court's order to show cause...for his failure to appear;
- to make any effort to comply with orders of this court and/or to justify the existence of this complaint;
- the amended complaint (all 500 pages of it) fails to comply with Rule 8(a)...particularly that portion of the rule which requires...a short and plain statement of the claim;
- vitriolic dialogue contained in plaintiff's response (and virtually every other paper he has filed).

Plaintiff appealed the district court's dismissal to the 11th Circuit Court of Appeals on April 1, 1996. More specifically, plaintiff sought: (a) to have venue transferred to the Key West federal courthouse, (b) either his initial or amended complaint accepted by the district court, (c) an answer to his complaint from defendants, and (d) an opportunity to proceed with discovery.

The circuit court affirmed the district court's dismissal of the complaint, on July 17, 1997 holding:

> The district court, sua sponte, scheduled a hearing to show cause as to why Jenkins' amended complaint should not be dismissed for failure to comply with Fed.R.Civ.P. 8(a), mailing notice to all parties at their addresses of record. Jenkins failed to appear or even attempt to reschedule the hearing.

> The district court then issued an order to Jenkins to show cause why the court should not dismiss the case and issue sanctions for his failure to appear. Jenkins responded in an untimely manner, asserting that he had never received notice of the hearing because of a change of address. Subsequently, the district court rescheduled the hearing once again, but Jenkins failed to appear. * * * In reviewing the record in this case, we observe that Jenkins has attempted to assert over 100 claims for relief against seventeen defendants. Moreover, the amended 500-page complaint is clearly redundant, irrational, and a gross violation of Rule 8. Instead of specifying his claims, Jenkins repeated his vague allegations separately for each defendant. The amended complaint is filled with conclusory statements and arguments, but few factual assertions, making it impossible to discern what claims are being alleged. * * * Justice does not require a district judge to sort through numerous pages of irrational, prolix, redundant pleadings, because it would undermine the purpose of Rule 8.

Reasons for Granting Writ

It would seem from the foregoing "statement of the case," on their face these lower court decisions appear to be well-founded. At this point it would appear to require a miracle to prevail over these adverse decisions by the five federal judges who made them. Nevertheless, this petitioner is here praying for that miracle from you. All petitioner has to offer you is truth and reason, and prays you listen with an open mind.

Is petitioner here to argue in favor of 500 page complaints? Of course not. The truth is this district court ordered plaintiff to greatly expand his complaint and then in Catch-22 like trap, dismissed it for being too long.

Is petitioner here to argue in favor of disobeying court orders, or failing to appear at hearings? Who in their right mind would? In actuality, the district court ordered this petitioner to lie in a Procrustian bed[1] and when petitioner did not fit, lopped off his legs, throwing him out of court.

As petitioner suspects is not unusual among judges, many of the reasons cited by the district court and court of appeals for this dismissal and affirmation are a pretext for actual reasons they could

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[1] Procrustean: A legendary robber of ancient Greece who forced his victims to fit a certain bed by stretching or lopping off their legs. See Frankfurter's remarks in *Kingsley Co. v. Regents*, 360 U.S. 684, 697.

not properly have under the law.

This is a relatively easy case before you. Petitioner believes it suitable for summary judgment. There are no complex financial, scientific, moral, legal, or merit issues to untangle and weigh here. The areas of law involved are few and very familiar to most federal judges. Whereas this plaintiff is still struggling after three years, to get his 'notice pleading' accepted by the court, the merits of his case have ostensibly not been considered by the lower courts. There has been no federal trial and no discovery, so there are few if any facts to consider. Just relatively simple questions of law.

What petitioner presents here are federal procedural questions; not questions in some arcane area of substantive law. Whereas federal procedure to a large extent derives from your Constitutional authority to regulate the federal courts, there is little risk in any judgment you make here. Your decision here is not necessarily final, casting in stone some substantive doctrine for centuries to come. You'll find this case easy—not queasy.

Although the issues here are simple, clear, not fact-specific, and easily adjudicated on narrow procedural grounds, they are nonetheless very important for the long term integrity of the federal judicial system, and important to citizens who come to the federal courts seeking relief, expecting predictable and uniform application of federal procedure. The lower court decisions in this case are not merely an erroneous application of law,[2] they are such a flagrant disregard for your previously announced doctrine on federal procedure, as to call for an exercise of this Supreme Court's power of supervision.

Turning now to the questions presented, perhaps the most imporant issue in this case is where and how venue is laid. First...litigants must be able to get to the court house door. "It is not enough that the doors of the temple of justice are open; it is essential that the ways of approach are kept clean."—Brewer: *Hatfield v. King*, 184 U.S. 162, 168.

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[2] This petitioner does not merely seek a court of last resort. Petitioner presents questions of general importance which need no further ripening, percolation, or bubbling up from below. Some of the questions presented are based on indistinguishable conflict among the courts, in need of solution, and very tractable. The conflicts will not cleanse themselves before substantial injustice is inflicted. Nor are these conflicts trumped up just to get relief for this petitioner. The local venue rule issue petitioner presents here may at first seem novel and avoidable but this issue is clean and amenable to resolution.

Venue

Has a district court judge incorrectly applied the federal rules of civil procedure or violated a litigant's due process, when he calls hearings in a venue which he deems more convenient, than the venue prescribed by local court rule and intended for the convenience of litigants?

The district court and this petitioner came to loggerheads over venue of the proceeding. Petitioner filed his complaint at the Key West branch of the Southern District of Florida. Without any prior or subsequent notice to petitioner venue was transferred to Miami 150 miles away from Key West, by District Judge Shelby Highsmith and or Magistrate Judge Steven Brown, who were assigned to the case and have their chambers in Miami. Fourteen of the seventeen defendant-respondents and this plaintiff-petitioner reside in either Key West or nearby. Three defendants reside in Miami but are agents of the Key West defendants. Current legal counsel for all defendant-respondents are located in Miami. In other words, this civil action arose in and all parties are located proximate to Key West—except for the magistrate, judge, and defendant's legal counsel.

The Southern District of Florida includes the counties of Broward, Dade, and Monroe. Court for the Southern District is held at West Palm Beach, Fort Lauderdale, Fort Pierce, Miami, and Key West. Key West is in Monroe County (the Florida Keys). Southern District Local Rule 3.1.D. prescribes that "Monroe County actions and proceedings shall be tried at Key West, Florida." Plaintiff expected pursuant to this promulgated federal rule that any and all proceedings would transpire at Key West. When the first hearing was called, the site having been designated in Miami, plaintiff-petitioner moved that the district court hearing proceed in Key West in accordance with Local Rule 3.1.D. His request was denied. The salient reason being it would be inconvenient for the Miami judges assigned to the case, to travel to Key West. Petitioner raised the question why a Key West federal judge was not assigned to the case. The Miami judges explained that judges are randomly assigned to cases throughout the district. This explanation is inconsistent with Local Rule 3.4.D. which describes a Southern District divided into northern and southern divisions, with judges assigned to either one or the other division—but not both. The judges' actions here have the appearance of self-interest if not impropriety.

The local venue rule 3.1.D., should be considered in the context of related broader venue law. A number of venue statutes are found in Title 28 of the United States Code. A party or the court *sua*

sponte may move for a change of venue under 28 U.S.C. § 1404(a) "For the convenience of parties and witnesses, in the interest of justice, * * * to any other district or division where it might have been brought." Rule 12(b) Fed.R.Civ.P. provides "the following defenses may * * * be made by motion: * * * (3) improper venue." § 1391 is a general venue statute laying venue in a district "in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1393, which was repealed approximately 10 years ago, imposed division venue restrictions on the districts. Though no longer required, division venue remains in many districts by local rule and was repealed in order to afford greater flexibility in devising appropriate local venue structures.[3] Rule 77(b) Fed.R.Civ.P. commands "no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby."

Florida Southern District Local Rule 3.1.D. narrows the broader federal venue statutes and rules, specifically laying venue at Key West Florida for actions arising in Monroe County. Where a court has adopted a local rule to implement a general civil rule, elemental fairness requires resort to the more particularized local rule, upon which the parties are entitled to rely.[4]

Judicial councils, as well as this Supreme Court and Congress, have primary authority over local district court rules.[5] District judges must obey local rules as with other federal rules.[6] It is well settled that court rules have the force of law. *Sibbach v. Wilson & Co.* 312 U.S. 1, 13 (1941); *Weil v. Neary*, 278 U.S. 160, 169 (1929); *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1962). They are binding not only upon litigants but the court as well. Local rules must be followed by district judges until they are modified in the manner authorized by law.[7]

The magistrate judge in his report and recommendation denying petitioner a change of venue, stated he would "defer to the District Judge regarding the venue of the trial, if and when that decision need be made." The inference here is that venue in this district is deemed by these judges to be a matter of judicial discretion, not laid

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[3] See Moysi v. Trustcorp, Inc. (ND Ohio) 725 F Supp 336 where a local division venue rule was upheld; and 32A Am Jur 2d § 1419.

[4] Jardines Bacata, Ltd. v. Diaz-Marquez (CA1 Puerto Rico) 878 F2d 1555.

[5] See 28 U.S.C. § 2071 & 2; 28 U.S.C. Sec. 332 (1976); 28 § 332(d)(1).

[6] Columbia L. Rev 1251 (1967).

[7] Woods Constr. Co. v. Atlas Chemical Industries, Inc. (CA10 Okla) 337 F2d 888.

by rule of law.

Venue is not a matter of judicial discretion or privilege. Discretion does not lie where there is a hard and fast rule.— Sutherland: *Langnes v. Green*, 282 U.S. 531, 541. There is just such a rule here.

> If there are no rules upon which suitors can depend or rely, they can be trapped or misled, while the favored friends of the tribunal are securing special treatment. Regular procedure is necessary to secure equal treatment for all.— *Charles E. Clark, .The Handmaid of Justice, 23 Wash. U. L.Q. 297, 299 (1938).*

Let appellant proceed as Aristotle urged: "by the impersonal yardstick of the laws," rather than according to the convenience and caprice of judges. The 11th Circuit Court which ignored this petitioner's plea that the district judge has arbitrarily denied him due process, has itself stated in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981): "Stability and predictability are essential factors in the proper operation of the rule of law".

It is not the province of a district court to modify, revise or disregard the plain terms of a rule for its guidance which superior courts presume will be followed. District courts can make rules to conduct their business but those rules are subject to public scrutiny and are formulated with the advice and consent of higher authorities, including those whom the rules affect.[8] Modification of those rules cannot be obtained through district court interpretation. *Leatherman V. Tarrant County NICU*, 507 U.S. 163 (1993).

Venue law in this nation is a doctrine of convenience [9] and a personal privilege.[10] It is not the personal privilege or convenience of judges and legal counsel, but of our citizens. *Leroy v. Great Western United Corp.*, 443 U.S. 173. It stems from a long history of government abuse:

> [the present King of Great Britain] He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.— *The Declaration of Independence.*

Federal venue laws are "generalized attempts to promote the

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[8] Baylson v. Disciplinary Bd. of Supreme Court (ED Pa) 764 F Supp 328 affd (CA3 Pa) 975 F2d 102; U.S. v. Terry, C.A.9 (Cal.) 1993, 11 F.3d 110.

[9] Vance Trucking Co. v. Canal Ins. Co. (CA4 SC) 338 F2d 943, on remand (DC SC) 249 F.Supp. 33, affd (CA4 SC) 395 F2d 391.

[10] Harris Corp. v. National Iranian Radio & Television (CA11 Fla) 691 F2d 1344.

same goals of convenience and fairness." *Van Dusen v. Barrack* 376 U.S. 612 (1964). They protect litigants, witnesses, and the public against unnecessary inconvenience and expense.

Title 28 U.S.C. § 1404(a) permits a venue transfer for the convenience of the parties or their witnesses, but it does not mention the convenience of counsel or court. Venue laws are a "forum limitation imposed for the convenience of the parties,"[11] not for the convenience of the court.[12] And the convenience of counsel is the least important consideration.[13]

The plaintiff in the instant case chose the only reasonable and convenient venue for both himself and defendants. Several authorities have opined that absent fairly extraordinary circumstances, plaintiff's choice of venue should remain undisturbed.[14] Essentially the question here is: shall the district courts of this nation be guided by the rule of law or by their own convenience?

Complaint Vague, Rambling, Irrational

Has a circuit court incorrectly applied the federal rules of civil procedure, such as rule 8, when it affirms dismissal of a complaint making allegations other than those under Rule 9 [fraud or mistake], because it contains vague or conclusory allegations?

Among the reasons the 11th Circuit gave for affirming dismissal of plaintiff's amended complaint was he: "repeated his vague allegations" from the initial complaint, and the "amended complaint is filled with conclusory statements and arguments, but few factual assertions." As a matter of law, the court of appeals erred in four

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[11] United States ex rel. Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969).

[12] Collins v. American Auto. Ins. Co. (CA2 NY) 230 F2d 416; Mazinski v Dight (DC Pa) 99 F. Supp. 192; Fannin v Jones (CA6 Ohio) 229 f2d 368; Jerclaydon, Inc. v. Hosid Products,Inc. (DC NY) 104 F. Supp 122; Savoia Film S.A. I. v. Vanguard Films, Inc. (DC NY) 10 F.R.D. 64; Brown v. Insurograph, Inc. (DC Del) 85 F.Supp. 328.

[13] Breindel v. Levitt & Sons, Inc. (ED Pa) 195 F Supp 197; Saraf v. Chatham Carpet Mills, Inc. (SD NY) 275 F Supp 951; Triangle Industries, Inc. v. Kennecott Copper Corp., 325 F.Supp. 150 (E.D.Pa.1971); Weinberger v. Retail Credit Co., 34.5 F.Supp. 165 (E.D.Pa.1972); Libby v. Russell, 349 F.Supp. 573 (N.D.Miss.1972); Xerox Corp: v. Litton Industries, Inc., 353 F. Supp. 412 (S.D.N.Y.1973).

[14] See Federal Venue: Locating the Place Where The Claim Arose, 54 Tex L Rev 392, 414 (1976); Seidelson, Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions, 37 Geo Wash L Rev 82, 85 (1968).

ways: (a) the district court opinion in no manner whatsoever describes the initial complaint as vague; (b) dismissal of a complaint because it is deemed 'vague' is contrary to principles previously ennuciated by this Supreme Court; (c) conclusory statements do not in and of themselves violate the federal pleading rules; and (d) factual assertions are not required by the federal pleading rules.

As to error (a), the court of appeals appears to have pulled this 'vague' finding out of thin air. Perhaps the 3 judge panel reasoned that since the district court rejected petitioner's claims because they were not 'specific' the claims must therefore be 'vague.' The either/or fallacy is self-evident. A claim that is not specific is not necessarily vague.

As to error (b), this Supreme Court made it clear in *Glus v. Brooklyn Eastern Dist. Terminal* (1959) 359 U.S. 231: "It may well be that petitioner's complaint as now drawn is too vague, but that is no ground for dismissing his action." The 11th Circuit's opinion clearly conflicts with previously announced doctrine of the Supreme Court, and with other circuits as well.[15]

If language in the complaint lacked definition, as the defendants argued in their motion to dismiss, they or the court should have pointed out where and how.[16] Rule 12(e) Fed.R.Civ.P. provides that in a motion for a more definite statement, the defendants shall "point out the defects complained of and the details desired." Even if there is some vague language in the complaint, claims can be fleshed out during pretrial pursuant to rules 16 and 26-37.[17]

Neither the defendants nor any of the lower courts in this case have made any attempt whatsoever during *three years* of federal litigation, to show where any paragraph, count, claim, or even a single phrase in plaintiff's two filed complaints, is vague. If the 500 page complaint is rife with vague allegations, defendants should be able to point out a few and describe the what details they need to frame an answer? The district court ordered petitioner to be specific but the burden was properly on defendants and the court to be specific as to where plaintiff was vague and the details desired.[18]

Below is an example of one of these allegedly vague and "impossible to answer" claims which plaintiff presented in his initial complaint:

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[15] Cf. Strauss v. City of Chicago, 760 F.2d 765, 767 (7th Cir.1985).

[16] 61A Am Jur 2d §207.

[17] De Witt v. Pail, 366 F.2d 682, 685 (9th Circ. 1966). §8:13, 2A Moore's Federal Practice, 2d ed. chpt 8.

[18] 846 F.Supp. 1372, Parsons v. Burns, (W.D.Ark. 1993).

> FKCC in its official capacity, warned him that entering any area of the college premises without this advanced written permission, would result in the withholding of any further paychecks to which he was entitled. The teacher fully complied with the order. FKCC in its official capacity, later withheld the teacher's paychecks. More specifically, his paychecks at the beginning of the 1993-1994 annual contractual period were withheld. Those paychecks were withheld before the teacher was terminated from his office, while he still had a contract which stipulates that the board will provide those paychecks to the teacher.

This language is not so vague that the college defendants can in good faith assert they have no idea what plaintiff is alleging in this 'notice pleading.' They should be able to answer this allegation. It is reasonable to presume this multimillion dollar public college keeps payroll records. At the very least the defendants could have answered pursuant to rule 8(b), Fed.R.Civ.P. that they are without knowledge or information sufficient to form a belief as to the truth of this averment. There is enough detail in the allegation to guide discovery.

In addition to 'vague' the defendants argued and the court of appeals affirmed that plaintiff's amended complaint is 'irrational'. This should be taken with a grain of salt. The complaint is far from "lacking the faculty of reason": Webster's College Dictionary. If the district court actually believed that to be true, it should have dismissed the complaint as frivolous, on the grounds it fails to assert any apparent factual or legal foundation.[19]

Could there be a method to plaintiff's madness which defied the comprehension of five federal judges and these defendants?[20] Have a look at another allegation, from the amended complaint:

> On September 2, 1992, FKCC in its official capacity, sent a memorandum to the teacher in which FKCC in its official capacity, prohibited the teacher from making any statements publicly which could be construed as having political implications, and prohibited the teacher from involving the college in possibly controversial political subjects.[21]

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[19] Brandon v. District of Columbia Board of Parole, 734 F.2d 56, 59 (D.C. Cir. 1984).

[20] Five of these defendants are attorneys, and presumably of at least ordinary comprehension.

[21] The memorandum stated, *inter alia:* "*College* employees (and this includes adjunct instructors) should be wary of making any statements publicly which could be construed as having political implications * * * involving the college in possibly

Plaintiff's statement here satisfies rule 8(a)(2) as a "short and plain statement of the claim showing that the pleader is entitled to relief" directly under the First and Fourteenth Amendments for abridgment of his right to free speech, and less directly under federal statute 42 U.S.C. § 1983.

The corollary claim in the shorter and less detailed initial complaint was:

> The board members, president, dean of faculty, dean of students, and division chairman, did so violate the laws of the United States when they: prohibited the teacher from making any statements publicly which could be construed as having political implications; prohibited the teacher from involving the college in possibly controversial political subjects.

Though the original claim in the initial complaint lacked enough "specific" details to suit the whim and fancy of these lower court judges, who apparently want plaintiff to plead evidence and wish to try the case in the pleadings, this language cannot be realistically viewed as irrational or "impossible to discern what claims are being alleged."

This claim is not a bare conclusory averment of a right abridged—without any supporting factual allegation. Petitioner did not merely aver defendants have "abridged his right to free speech." It surely is not "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson* 355 U.S. 41 (1957), nor indisputable that plaintiff could make no rational argument on the law or facts in support of this claim. *Anders v. California*, 386 U.S. 738 (1967).[22]

The district court also proclaimed the initial complaint "rambling." To ramble means to write in a random, unsystematic, aimless manner:Webster's College Dictionary. This is another completely unfounded reason for dismissal. Petitioner submits the district court abused its discretion by rendering a horseback opinion without making a reasonable effort to evaluate the substance of the complaint. Even assuming arguendo that the complaint rambled, that is no reason to throw a *pro se* layman plaintiff out of court.[23]

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controversial political subjects. * * * be careful about involving the college in political arenas." This came on the heels of this teacher's public criticism of the local Superintendent of Schools.

[22] Wiggins v. New Mexico State Supreme Court Clerk, 664 F.2d 812, 815 (10th Cir. 1981); Williams v. Faulkner, 837 F.2d 304, (7th Cir. 1988).

[23] See § 1217, Wright & Miller, Federal Practice and Procedure. Sherman v. Air Reduction Sales Co., C.A.6th, 1958, 251 F.2d 543; Modern Distrib, Inc. v Wolin,

Federal courts should make a determined effort to understand what a *pro se* plaintiff is attempting to set forth in pleading.[24] As John Locke said: "He that judges without informing himself to the utmost that he is capable, cannot acquit himself of judging amiss."[25] The *true substance* of petitioner's claims are not so well disguised[26] one cannot make heads nor tails of them.

The 11th Circuit joined the defendants and district court in attacking the complaint, saying it is "filled with conclusory statements and arguments, but few factual assertions." This holding is consistent with a previous 11th Circuit Court ruling against

> making general, conclusory allegations of a constitutional violation * * * The court must be convinced of the existence of a clear, factually-defined, well-recognized right.[27]

As with the finding of 'vague,' these defendants and lower courts should have had no difficulty showing some examples of 'conclusory' statements among the 520 pages of allegation in the two complaints.

In any event, the 11th Circuit holding is squarely in conflict with principles established by this court in *United States v. Employing Plasterers' Ass'n of Chicago*, 347 U.S. 186 (1954):

> Whether these charges be called "allegations of fact" or "mere conclusions of the pleader," we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried.

Whether or not the complaint is "filled with conclusions and few facts" as the court of appeals held in the instant case, is pointless. Since the modern pleading rules were adopted in 1938 the distinction between "facts" and "conclusions" is no longer significant.[28] A complaint is not an anagramatic exercise in which

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D.C.Ill.1973, 60 F.R.D. 235.

[24] Polite v. Casella, 901 F.Supp. 90.

[25] Human Understanding. Bk. II. Ch. XXI.

[26] Simmons v. Abruzzo 49 F.3d 83 86-87 (2d Cir. 1995). §8:13, 2A Moore's Federal Practice, 2d ed. chpt 8.

[27] Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989).

[28] See § 1218, Wright & Miller, Federal Practice and Procedure, and §8:13, 2A Moore's Federal Practice, 2d ed. chpt 8; Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Delta Ref. Co., C.A.6th, 1960, 277 F.2d 694, 697; East Crossroads Center, Inc. v. Mellon-Stuart Co., D.C.Pa.1965, 245 F.Supp. 191, 193; Sachs v. Levy, D.C.Pa1963, 216 F.Supp. 44, 47; Lance, Inc. v. Ginsburg. D.C.Pa.1962, 32 F.R.D. 51, 52-53 (Lord, J.); La ferry v. Ajax Truck Rentals, D.C. Tenn.1958, 161 F.Supp. 707, 708 (Darr, C.J.); Smith, Kline & French Labs. v. Eric Hill Co.,

the pleader must find just exactly the prescribed combination of words and phrases.[29]

The court erred in concluding that conclusions are prohibited in a complaint. Mere conclusions satisfy the rules.[30] Complaints need not plead facts alone. Furthermore, plaintiffs are free to present mixed statements of fact and of legal conclusions, e.g. an allegation of negligence.[31] An averment of malice is a conclusion, and so forth. A complaint which comports with the federal pleading rules may be filled with conclusions, omit ultimate facts, and even fail to state a cause of action.[32] The defendants moved for a more definitive pleading of plaintiff's "cause of action" and the magistrate judge supported their motion, calling for a "cause of action" at least three times in his report and recommendation, and specifically calling for detailed 'facts' in plaintiff's complaint.

These defendants and federal judges do not understand that in 1938 rule 8, Fed.R.Civ.P. substituted the requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief" for the old formula "facts constituting a cause of action," which typified the codes.[33] Rule 8 does away with the confusion resulting from the use of "facts" and "cause of action."[34] As your Supreme Court said in *Davis v. Passman*, 442 U.S. 228 (1979): "The meaning of this missing "cause of action," however, is far from apparent."

In the three years since petitioner filed his initial complaint, petitioner has come to a much better understanding of the federal pleading rules and now realizes his two complaints are far from a

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D.C.Ohio 1951, 11 F.R.D. 290; Howitt v. St. John, D.C.Ohio 1951, 9 F.R.D. 608, 609 (Jones, C.J.); Jackson v. Marion CountY, C.A.7th, 1995, 66F.3d 151.

[29] Thompson v. Allstate Ins. Col, C.A.5th, 1973, 476 F.2d 746, 749 (Wisdom, J.).

[30] §8, 2A Moore's Federal Practice, 2d ed. chpt 8; § 1215, 1216, Wright & Miller, Federal Practice and Procedure; Palmer v. Board of Community Unit School Dist. 201, 46 F.3d 682, 688 (7th Cir. 1995); Kelly v. Stratton, D.CIll.1982 552 F.Supp. 641; Northern States Power Co. v. Franklin, 1963, 122 N.W.2d 26, 29, 265 Minn. 391, 394 (Rogosheske, J.); Mills v. Injury Benefits Plan of Schepps-Foremost, Inc., D.C.Tex.1993, 851 F.Supp. 804, 806 (Fish, J.).

[31] See the Official Forms; and 61A Am Jur 2d §16.

[32] Ferrara v. Interstate Transit Lines, D.C.Mo.1945, 5 F.R.D. 54, 55-56; Marshall v. Electric Hose & Rubber Co. (1974, DC Del) 65 F.R.D. 599; 7th Circuit-Jackson v. Marion County (1995, CA7 Ind) 66 F3d 151, 33 FR Serv 3d 569, subsequent app (CA7 Ind) 67 F3d 301; Lucas v Park Chrysler Plymouth, Inc. (1974, DC Ill) 62 FRD399.

[33] § 1202, Wright & Miller, Federal Practice and Procedure.

[34] § 8:02, 2A Moore's Federal Practice, 2d ed. chpt 8.

model of pleading. A much improved second amended complaint could now be prepared. Petitioner however believes it would be to no avail against these judges who after a cursory review have prejudged his suit to be a nuisance without merit.[35]

Petitioner knows the federal pleading law well enough now to clearly see his two complaints complied with the pleading rules and gave defendants fair enough notice to prepare an answer. Since the inception of this federal civil suit petitioner has been jerked around by these defendants and federal judges, who have taken advantage of his *pro se* layman's ignorance. They used terms like vague, conclusory, facts, elements, cause of action, and other "traps for the unwary,"[36] in bad faith as a pretextual means to befuddle and dismiss petitioner. Shame on them, and shame on you and this American system of justice if you let them get away with it. It will be "amidst the jeers and hisses of mankind."[37]

Fair Notice and Res Judicata

Has a district court judge incorrectly applied the federal rules of civil procedure when he dismisses a plaintiff's complaint for being impossible to answer, though defendants have moved to dismiss, asserting all plaintiff's claims are barred by res judicata?

Your Supreme Court held in *Walla Walla City v. Walla Walla Water Co.*, 172 US 1:

> A pleading is sufficient in this respect if it is intelligible to a person of ordinary understanding, and affords him, the court, and the jury, the means of determining what is intended.

These defendants and inferior court judges maintain it is impossible to determine what plaintiff intends in his complaint. At the same time, defendants adamantly asserted in their motion to dismiss, that a *res judicata* bar clearly applies to all of plaintiff's claims. Petitioner asks the Supreme Court to conclude that in a motion to dismiss, a defense of *res judicata* against a claim admits "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson* 355 U.S. 41 (1957).

Besides moving against the complaint for being 'vague,' defendants moved to dismiss because they have "no idea of his

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35 Petitioner believes that even if he submitted a one of the Official Forms with personalized substitutions, the claims would be rejected on some pretext.

36 Sir Montague Crakenthorpe, Q.C., 10 Harv.L.Rev. 238.

37 Sir William Erle regarding the unnecessarily complex rules of procedure in 16 volumes of Meeson & Welsby.

claim" the complaint being,

> unintelligible * * * impossible to follow and put no one on notice as to what his claims were * * * much less an idea of his claim and the grounds upon which it rested.[38] * * * or what facts are alleged in support of that claim * * * No Defendant should be required to guess the claim against which he will ultimately have to defend.[39]

The district court and court of appeals agreed, ruling respectively it is: "impossible for defendants to respond" and "impossible to discern what claims are being alleged." In the same motion to dismiss defendants assert "all causes of action are, on the face of the complaint, barred by res judicata." In support of a res judicata bar their motion presents several pages of detailed argument describing an identity of parties, *identity of thing sued for, and identity of cause of action.*[40] They criticize the complaint using language that tacitly admits fair notice of plaintiff's allegations:

> [m]any of the allegations pertain to * * * setting forth a claim of pretextual retaliation * * * a litany of claims of violation of civil rights * * * The same exact evidence * * * reiterated in the detailed history * * * relief that was available was substantially similar to that requested here * * * It is clear that there is no subject matter jurisdiction.

Apparently the claims were "clear" enough to see there is no subject matter jurisdiction by virtue of res judicata.

In their principal brief at the 11th Circuit, defendants devoted 8 of their brief's 10 pages of argument to asserting that res judicata bars *every single issue* plaintiff raises in his complaint.[41] Defendants' contentions here are obviously inconsistent. Rule 8(e) Fed.R.Civ.P. authorizes inconsistent pleading. The ostensible purpose is to allow reasonably comprehensive pleading when the pleader in good faith is unsure which claim or defense is applicable at the pleading stage, prior to discovery and other pre-trial measures which can subsequently more fully develop the facts and issues, and therefore refine the pleadings.

Rule 7(a) Fed.R.Civ.P. defines 'pleadings' as complaints, answers, and replies thereto. Motions are not pleadings. In the

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[38] Answer Brief Of Appellees, Robert Norton, Jeffrey Goodz, and Rodolfo Gomez. pgs. 19-26.

[39] Response To Plaintiff's Objections To Magistrate Judge's Report And Recommendation, October 10, 1995

[40] Motion to Dismiss, March 31, 1995.

[41] Answer Brief Of Appellees, February 10, 1997.

instant case no pleading has been filed by defendants. Petitioner contends defendants' motion may therefore find them admiting of fair notice.

Not only did defendants actually have fair notice, it appears the magistrate had some notion of what plaintiff was claiming as well — despite his proclamation it was entirely incomprehensible. For example, the magistrate discusses in his Report and Recommendation to dismiss, issued on August 30, 1995:

> plaintiff's erudite statement * * * there need be no 'official action or policy' by which some of these defendants deprived the teacher of his constitutional rights * * * is completely without merit.

This statement tacitly reveals the magistrate was aware of at least some allegations plaintiff was making, in this particular example a civil rights violation under § 1983. Whether or not these judges were fully aware of plaintiff's claims is unknown because they were largely silent on the substance of the claims, instead holding they couldn't make heads or tails of them. Petitioner believes these judges abused their discretion and breached they duty by failing to make a determined effort to understand what plaintiff was attempting to set forth in his pleading.[42]

In any event, the court should have determined if the parties had sufficient knowledge of the claims—not whether the court itself had sufficient knowledge of them.[43] It was clear not only from defendants' motion but from the prior Florida record, of which the district court ostensibly took 'judicial notice,' that defendants had fair notice and therefore should have been ordered to serve an answer to those specific claims which it can answer, and allowed to move for a more definite statement or other action as to remaining claims. "The gist of petitioners' cause of action has been clear from the outset." *Perma Mufflers v. Int'l Parts Corp.*, 392 U.S. 134. *Haines v. Kerner*, 404 U.S. 519 (1972) is also on point:

> We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." * * * he is entitled to an opportunity to offer proof.

In a nutshell, defendants would have this Supreme Court believe the *in forma pauperis pro se* petitioner was so irrational and

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[42] Polite v. Casella, 901 F.Supp. 90.; §630, West's Fed Practice Digest 4th.

[43] § 8:03, 2A Moore's Federal Practice, 2d ed. chpt 8

unintelligible that his complaint could not be comprehended, and at the same time all his claims are barred by *res judicata* because there is an identity of parties, identity of thing sued for, identity of cause of action, exact same evidence presented, and these claims have already been fully adjudicated in Florida courts.[44] Petitioner hopes you can see a little more clearly from your elevated vantage point than the lower courts, and yet not so elevated that you cannot reach down and correct this travesty of justice.

Specific Claims and Elements

Has a district court judge incorrectly applied the federal rules of civil procedure, inter alia, rule 8 [short, plain, simple, concise, direct, no technicalities], when he requires a plaintiff making allegations other than those under rule 9 [fraud or mistake], to compose specific claims with specific facts, and cite the elements necessary to substantiate each claim ?

In defendants' motion to dismiss the initial complaint, besides urging permanent prejudicial dismissal based on *res judicata*, they alternatively moved pursuant to rule 12(e), the court "require a more definite statement" of all plaintiff's claims which "would make it possible for them to identify each set of facts, theory of recovery, and requested remedy."

As discussed *supra*, rule 12(e) provides that defendants shall "point out the defects complained of and the details desired." Defendants did not, and the district court granted defendant's motion for an indefinite order requiring a more definite 'complaint' rather than 'claim' or 'statement.' However, reaching further than the authority in rule 12(e) which allows more 'definite' statements where a pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," the district court ordered 'specific' recitation of facts and a technical description of the legal elements required under each theory of recovery.[45]

Before discussing the 'specific' fact pleading issue, the 'elements' issue may not be clearly understood. The lower court and defendants did not merely request plaintiff establish all the essential elements of each claim—they commanded him to formally

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[44] These sham defenses are so patently in bad faith they warrant rule 11, Fed.R.Civ.P. sanctions.

[45] The magistrate recommended the district judge order "plaintiff note the elements that must be shown to substantiate a claim (for example that, as noted earlier, the plaintiff must allege violation of official policies to state a cause of action and must specify the policies violated)."

present a technical description of the elements necessary to substantiate each type of claim asserted under each theory of relief. This stretches the notion of simplified notice pleading embodied in the federal rules beyond all recognition.

There is little authority for requiring all the elements necessary to substantiate each claim,[46] let alone authority to require a plaintiff to describe the nature of elements necessary to substantiate each type of claim presented. This heightened pleading standard applied by the district court and affirmed by court of appeals, oversteps not only rule 12(e) but rule 8 (short/plain/simple/concise and no technical forms) as well. Those rules restrict judges as well as pleaders, and at the same establish a legal process due to each pleader which these lower courts denied this plaintiff.

This Supreme Court has visited the heightened pleading issue many times in the past. And not without reason. Long after the old code and common law systems were replaced by the modern pleading rules in 1938, judges today still coerce plaintiffs like this petitioner into technical pleading as a means to winnow out suits in disfavored subject areas (e.g. civil rights), by disfavored plaintiffs (e.g. *pro se*), or to try cases in the pleadings as a means to expedite cases. Professor Marcus of Columbia has noted that,

> the deeper reason for specificity in civil rights complaints is judicial hostility to the claim or the litigant. * * * yet such claims are * * * central to our concept of liberty.[47]

Fifty years ago, in *Hickman v. Taylor*, 1947, 329 U.S. 495, this Supreme Court held that the pleadings are restricted "to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial." Ten years later, in 1957, this Court rejected heightened pleading requirements more explicitly in *Conley v. Gibson* 355 U.S. 41:

> The respondents also argue that the complaint failed to set forth **specific facts** to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the federal rules of civil procedure do not require a claimant to set out in detail the

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[46] Mallett v. Timco Elec. Power & Controls, Inc., 815 F.Supp 992 (E.D. Tex. 1993); Wright v. Caspari, D.C.Mo.1992, 779 F.Supp. 1025; Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974); Comeno v. Beatrice Foods Co., D.C.Mo.1984, 595 F.Supp. 918, 920; See Gavit, The New Federal Rules and State Procedure, 1939, 25 A.B.A.J. 367, 369; § 1216, Wright & Miller, Federal Practice and Procedure; and §8:30, et seq., 2A Moore's Federal Practice, 2d ed. chpt 8.

[47] The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 471-79 (1986).

> facts upon which he bases his claim. To the contrary, all the rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. [emphasis added]
>
> and
>
> a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[48]

Your Court has clearly rejected the "specific fact" requirement which the lower courts in the instant case have used to throw petitioner out of court. You have rejected this heightened pleading standard[49] time and again since Conley.[50] It seems as Thomas Jefferson once said: *Vigilia pretium libertatis* (Eternal vigilance is the price of liberty). A detailed account of this Court's vigilence over the years is reviewed in McArdle, A Short & Plain Statement The Significance of Leatherman v. Tarrant County, 1994, 72 U.Det.Mercy L.Rev. 19.[51] As professor McArdle comments:

> over time certain lower federal courts developed their own, shall we call them, "special rules" of pleading to be applied in certain classes of cases * * * favoring the winnowing of the "substantial number" of "frivolous" civil rights suits. * * * to sidestep Conley. * * * "We acknowledge the Supreme Court's statement in Conley v. Gibson * * * Nonetheless, as this Court [7th Circuit] has recognized, Conley has never

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[48] See, E.G., Leimer V. State Mutual Life Assur. Co., 108 F.2d 302; Dioguardi V. Durning, 139 F.2d 774; Continental Collieries V. Shober, 130 F.2d 631.

[49] Except under Rule 9, Fed.R.Civ.Proc. where fraud and mistake require specific pleading.

[50] In 1959, *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231; *Haines v. Kerner*, 404 U.S. 519 in 1972; again in 1974 with the *Scheuer* cases, 416 U.S. 232; and on and on, with the most recent case nearly 5 years ago: *Leatherman v. Tarrant County NICU*, 507 U.S. 163 (1993).

[51] See also Heightened pleading: Is there life after Leatherman? 44 Cath U LR 1:59 (1994).

been interpreted literally."

Your Court responded to this doctrine of defiance, admonishing in *Leatherman*:: "In Conley v. Gibson we said in effect that the Rule meant what it said." The principal draftsman of the modern federal rules, Charles E. Clark, understood as does this Supreme Court: "strict special pleading has never been found workable or even useful in English or American law."[52] Nonetheless, heightened pleading standards continue today among the lower courts.[53] The decisions of these inferior courts are squarely in the teeth of pronouncements from your Supreme Court.

The theory of the rules is not to impose any additional requirements upon the pleader, but to lessen his burden, and to assist in the determination of the suit without sacrifice of the merits.[54] Moreover, they are especially repugnant when a layman such as this appears in federal court *in propria persona*, which calls for **heightened liberality—not heightened pleading** requirements.

Some of these courts now take the tack of distinguishing Leatherman. However, the lower courts in the instant case make no attempt to distinguish. They openly and defiantly ignore your authority by ordering this petitioner to detail the "specific facts," precisely as you prohibited in *Conley* and *Leatherman*. And this is not an anomaly in the 11th Circuit: "plaintiff must set forth the details," *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, (11th Cir. 1989).

While the 11th Circuit Court goes one way (the wrong way), some of its district courts go the other (the right way). Apparently where a plaintiff lives in Florida determines whether there are heightened federal pleading requirements. In Hillsborough County v. A & E Road Oiling Serv., Inc., D.C.Fla.1994, 853 F Supp. 1402 the heightened pleading standard was rejected. Even more

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[52] See Clark, The Bar and the Recent Reform of Federal Procedure, 1939, 25 A.B.A.J. 22, 23; Clark, The Handmaid of Justice, 1938, 23 Wash.U.L.Q. 297, 319, reprinted in Procedure-The Handmaid of Justice, Wright & Reasoner eds., 1965, 69, 83; Clark, Pleading under the Federal Rules, 1958, 12 Wyo.L.J. 177, 191-192; Clark, Simplified Pleading, 2 F.R.D. 456, 458 (1943); and Dioguardi v. Durning, C.A.2d, 1944, 139 F.2d at 775.

[53] See Kimberlin v. Quinlan, C.A.1993, 6 F.3d 789, 793; Julian v. New York City Transit Authority, D.C.N.Y. 1994, 567F.Supp.242; Alliance of New Jersey v. B& Parisi, D.C.N.J.1994, 554 F.Supp. 299; Chayo v. Kaladjian, D.C.N.Y.1994, 844 F.Supp. 163; Ross v. Alabama, D.C.Ala.1995, 893 F.Supp. 1545; Schultea v. Wood 47 F.3d 1427, 1432-1434 (5th Cir. 1995); Veney v. Hogan, C.A.6th, 1995, 70 F.3d 917.

[54] §8:02, 2A Moore's Federal Practice, 2d ed. chpt 8

confusing and intolerable is the realization that which particular federal judge a plaintiff gets—in the same Southern District of Florida, apparently determines whether he will have a heightened pleading requirement under the federal rules. See Neizil v. Williams, 543 F.Supp. 899 (S.D.Fla.1982), (detailed facts not required); and City of Miami Firefighters' and Police Officers' Retirement Trust v. Invesco, Inc., 789 F.Supp. 392, (S.D.Fla. 1992); (details not required).

Nevertheless, in a futile effort to comply with this confused and conflicted Southern District Court, petitioner went forward and expanded his initial 20 page complaint into a much more specific 500 page amended complaint. Rather than risk underestimating the level of detail which would suit the whim and fancy of the judge, and in so doing disobeying his order to be 'specific', petitioner was much more detailed in the second complaint. The district judge then deemed the amended complaint not short and plain enough and the court of appeals affirmed. The court placed petitioner in peril, between the Scylla of legal conclusions and the Charybdis of evidence.[55]

Loyolla professor Lawrence W. Moore captured the issue somewhat more metaphorically in the last paragraph of Pleading Civil Rights Complaints: Wheat and chaff, 23 Akron L.Rev. 187 (1989): "requiring specificity is not a very good way to distinguish wheat from chaff as both are likely to be blown away in the hurricane of supposed efficiency.

Separate Defendant Counts

Has a district court judge incorrectly applied the federal rules of civil procedure, inter alia, rules 1, 8, and 10, when he requires claims against each defendant in separate counts, when those defendants are numerous and alleged to be individually liable for the acts of the group, such as a board of trustees, and when those defendants are all represented by the same counsel?

The defendants offered the district court a pleading trap which the court then set for this unwary layman plaintiff. The defendants urged in their motion to dismiss:

> there is no separation of counts and theories so as to make it clear as to which defendants are charged with which particular factual allegations. Similarly, the lack of separation of identification of counts and theories renders it impossible to determine which relief is sought from which defendants * * * plaintiff should be required to set forth

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[55] Between two mythical Greek monsters, i.e. a rock and whirlpool.

each cause of action against each defendant in separate paragraphs to facilitate the ascertainment of which theories are alleged against which parties.

The district court then ordered petitioner to present "specific claims against specific defendants."

Petitioner followed the order but doing so necessarily rendered his complaint highly redundant because most of the 16 *personam* defendants are accused of identical wrongdoings, when they acted in concert as college administrators and trustees, in a complex series of actions over more than a year, involving a long investigation of the teacher, charges and counter charges, the eventual termination of the teacher, and concomitant actions such as denying him access to public records, banning him from the campus, retaliation for whistle blowing about college software piracy, seizing his personal computer equipment, withholding his paychecks, and so on. The complaint alleges most of the defendants are individually liable for some acts of the group as a whole. Distinguishing at the 'notice pleading' stage—prior to discovery, who played precisely what role in the alleged wrongdoing, and in what capacity, be it official or individual, is an unreasonable burden to place on this or any *pro se* layman plaintiff.[56]

The district court's own order for more specificity is the major reason why the 20 page very succinct initial complaint ballooned to 500 pages in an amended complaint.

Like several other issues discussed herein, there is much conflict among the lower courts on this issue of specific separate claims against each specific defendant. The federal rules prescribe nothing of the sort on their face. Some lower courts have constructed this heightened pleading requirement on their own questionable authority,[57] while others have rejected the notion.[58]

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[56] See Federal Deposit Ins. Corp. v. Paul, 735 F.Supp. 375, (D.Utah 1990).

[57] Gauvin v. Trombatore, D.C.Cal.1988, 682 F.Supp. 1067; Sapery v. United Am Metals Corp., D.C.N.Y.1940, 1 F.R.D. 106; Utah Gas Pipelines Corp. v. El Paso Natural Gas Co., D.C.Utah 1964, 233 F.Supp 955; Pamela Amusement Co v. Scott Jewelry Co., D.C.Mass. 1958, 22 F.R.D. 255.

[58] See § 1324, Wright & Miller, Federal Practice and Procedure; § 73, American Jurisprudence; and § 62:105, § 62:51, Federal Procedure, Lawyer's Edition; and Palmer v. Board of Educ. (1995, CA7 Ill) 46 F3d 682; McDougall v. Donovan, D.C.Ill.1982, 552 F.Supp. 1206, 1209; United States v Iroquois Apartments, Inc. (1957,DCNY) 21 F.R.D. 151; Securities & Exchange Corn. v. Quing N. Wong (1966, DC Puerto Rico) 252 F.Supp 608; Plummer v. Chicago Journeyman Plumbers Local Union (1978, ND Ill) 452 F.Supp. 1127; Nagoya Associates, Inc. v. Esquire, Inc., D.C.N.Y.1961, 191 F Supp. 379; Sapery v. United Am. Metals Corp., D.C.N.Y.1940, 1 F.R.D. 106; Messing v. Megzzeo (1994, ED NY) 854 F Supp

Perhaps most availing in closing this issue, an examination of Official Form 10—approved by this Supreme Court, sanctions use of a single count wherein allegations are presented against more than one defendant. This heightened pleading order to separate claims for defendants who are alleged to have acted in concert, in the same legal capacity, presenting the same right of action, represented by the same counsel, simply subverts the fundamental philosophy of the federal pleading rules. As Judge Clark noted in *Nagler*, C.A.2d, 1957, 248 F.2d 319, Id. at 325, such orders "double the bulk without increasing enlightenment, while they delay the cause and exhaust the time of several judges."[59]

Redundancy

Has a circuit court incorrectly applied the federal rules of civil procedure, inter alia, rules 10(b) and (c) [adoption by reference] when it affirms dismissal of a complaint for being redundant?

Without being specific as to where, the 11th Circuit Court of Appeals affirmed dismissal of petitioner's complaint because *inter alia*, it was 'redundant.' Petitioner asserts here that 'redundancy' by itself is an insufficient reason for dismissal. Where the number and variety of issues make for extensive pleading in a case, duplications of factual allegations are often necessary to place a series of claims in proper context.[60] Logically one may correctly infer that since rule 10(c) explicitly authorizes adoption by reference in a pleading, redundancy is therefore authorized. Adoption by reference is authorized in the rules in order to reduce the burden of dealing with necessary redundancy.

There are other reasons a complaint can be justifiably redundant as well. Some courts require claims against a defendant in their official and individual capacities to be stated redundantly in separate counts—as this petitioner cautiously presented in his amended complaint. Such courts require formal separate and redundant claims against each defendant in their respective capacities, in order to preserve a right of action in that capacity.[61] Pity on a *pro se* layman when he encounters this pleading trap for the unwary. As may be expected, there are other federal courts and circuits who take a more liberal view of federal pleading—in the spirit of your Conley

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[59] § 1221, Wright & Miller, Federal Practice and Procedure.

[60] Peter Kiewit Sons. Co. v Sulnmit Construction Co. (1969, CA8 SD) 422 F2d 242.

[61] Castleglen, Inc. v. Commonwealth Sav. Asso. (1988, DC Utah) 118 F.R.D 515; Atchinson v. District of Columbia, CA.D.C.1996, 73 F.3d 413.

and Leatherman doctrine.[62]

What really needs to be distinguished here is necessary or reasonable redundancy, and unnecessary or unreasonable redundancy. Petitioner cannot fairly respond to a vague and conclusory court finding of 'redundancy' without the court pointing to some specific examples so plaintiff can correct the deficiency. If the complaint is unnecessarily redundant the court or defendants can act to strike the specific surplusage under rule 12(f). Where the deficiency of the pleading is that it contains too much detail, the court should strike redundant or immaterial matter rather than dismiss the entire complaint.[63] Instead these judges strike the entire complaint and throw petitioner entirely out of court.

Short 'complaint' or 'claim'

Has a district court judge incorrectly applied the federal rules of civil procedure when he dismisses a 'complaint' for violating the "short and plain" provision of rule 8(a)(2), or does this provision correctly apply to a 'claim'?

The district court opinion states:

> "the amended complaint (all 500 pages of it) fails to comply with Rule 8(a) * * * particularly that portion of the rule which requires * * * a short and plain statement of the claim."

The court of appeals affirmed that opinion declaring:

> "the 500-page complaint * * * a gross violation of Rule 8" and "Justice does not require a district judge to sort through numerous pages of irrational, prolix, redundant pleadings, because it would undermine the purpose of Rule 8."[64]

The issue here is whether rule 8 may be correctly applied to the

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[62] Byron v University of Florida, D.C.Fla.1975, 403 F.Supp. 49; Parker v. Graves (1978, CA5 Fla) 479 F2d 335; Gray v. University of Kansas Medical Center, College of Health Sciences, etc. (1989, DC Kan) 715 F. Supp. 141; also see § 1487, West's Federal Practice Manual; § 39.0-Cyclopedia of Federal Procedure Forms, Nichols, Vol. 1A, 1993.

[63] Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir.1988); Giuliano v. Everything Yogurt, Inc., D.C.N.Y.1993, 819 F.Supp. 240; Atwood v. Humble Oil & Refining Co., 243 F.2d 885, 888 (5th Cir. 1957); Lonesome v. Lebedei, D.C.N.Y.1992, 141 F.R.D. 397.

[64] The Court of Appeal cites Gordon v. Green, 602 F.2d 743, 745 (5th Cir. 1979), as the source of this commonly used boilerplate, but Gorden actually derives the phrase from Passic v. State, E.d.Mich., 1951, 98 F.Supp. 1015, 1016.

entirety of a complaint, irrespective of the nature of any claim or averment therein. The lower courts in the instant case have identified no claim or averment in petitioner's complaint which violates rule 8. On its face the rule says 'claims' and 'averments' shall be short and plain—not 'complaints.' Federal courts have many times assumed authority to extend and modify this rule, substituting 'complaint' for 'claim'. Petitioner urges here that rule 8 applies only to a claim and averment, and as a consequence, the district court has a duty to make a reasonable attempt to test each claim and averment, and if it fails, then the court may order it stricken or amended.

Length of Complaint

Has a district court judge incorrectly applied the federal rules of civil procedure, inter alia, rule 8(e)(2) [state as many claims as you have] when he dismisses a complaint for being too long per se?

This question is closely related to the previous question. The district court in the instant case held that petitioner's 'complaint' by virtue of its 500 page length alone, violates rule 8. The court of appeals agreed.

First of all it should be understood that petitioner did not want to prepare a 500 page complaint. Note that his initial complaint was 20 pages in length. He was forced to unnecessarily expand the complaint by order of the district court. It was either that or abandon claims it is his due process right to make under rule 8(e)(2), Fed.R.Civ.P.

The lower courts are conflicted on this issue of length as well. A guiding principle seems undefined. Yet it seems that excessive length is normally just one of several factors in a dismissal where length is cited as one of the reasons. Others factors often include *inter alia*: unnecessarily redundant, immaterial, impertinent, argumentative, conclusory, or scandalous matter.

Acceptable length has varied considerably. In Harzfeld's Inc. v. Otis Elevator Co., D.C.Mo.1953, 114 F.Supp. 1015, a **9 page** complaint is rejected as too long in violation of rule 8. In stark contrast a complaint **108 pages long** with more than **600 paragraphs** is deemed not in violation of the rules, Wolfson v. Lewis, D.C.Pa.1996, 168 F.R.D. 530.[65]

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[65] A few of the many examples where a complaint was dismissed for being too long include: Gordon v. Green, 602 F.2d 743, 745 (5th Cir. 1979), cert. denied, 459 U.S. 1203 (1983); In re Westinghouse Sec. Litig. (1996, CA3 Pa) 90 F3d 696; Washington v. Baenziger, 656 F.Supp- 1176 (N.D.Cal.1987); McHenry v. Renne (1996, CA9 Cal) 84 F3d 1172; and a few of the many cases where a long complaint was allowed: U.S. v. Ben Grunstein & Sons Co., D.C.N.J. 1951, 12 F.R.D., 184,

Petitioner contends it is a violation of the federal rules of civil procedure in addition to denial of his due process, to dismiss his complaint on its length per se, as the district court in the instant case has done. If any single count of the complaint meets the requirements of rule 8, then dismissal of the entire complaint for violating rule 8 constitutes an abuse of judicial discretion.[66]

> It should be noted that Rule 8(a)(2) speaks of a short and plain statement of each claim, not a short and plain pleading. * * * the entire pleading may prove to be long and complicated by virtue of the number of parties and claims. § 1217, Wright & Miller, Federal Practice and Procedure.

Dismissal is not justified because the allegations are many and involve numerous defendants.[67] The complexity of the claims involved must also be taken into account when applying Rule 8.[68]

The long and short of it is this: the proper test is of each count—the test is not the count of pages.[69]

> [B]revity does not rank in importance with the right and duty of a litigant to present his demands * * * in a style and form of expression that represents [his] best effort to present the claims according to his own notions of their merits.[70]

The district court clearly erred when it found the complaint

(440 claims); Government Guarantee Fund v. Hyatt Corp., D.C.Virgin Islands 1996, 166 F.R.D. 321 (98 page); Morgan v. Kobrin Secs., Inc., D.C.Ill.1986, 649 F.Supp. 1023 (88 page); Azar v. Conley, 456 F.2d 1382, 15 FR Serv2d 1179 (6th Cir. 1972); Citicorp Int'l Trading Co. v. Western Oil & Refining Co., 771 F.Supp. 600 (S.D.N.Y. 1991) (220 paragraphs).

[66] Cooper v. R. J. Reynolds Tobacco Co. (1956, CA1 Mass) 234 F2d 170, 80 ALR2d 674, later app (CA 1 Mass) 256 F2d 464, 1 FR Serv 2d 181, cert. den 358 US 875, 3 L Ed 2d 105, 79 SCT 112.

[67] Azar v. Conley, C.A.6th, 1972, 456 F.2d 1382, 1391 (Miller, J.).

[68] Kaufman v. Magid, 539 F. Supp. 1088 (D. Mass. 1982); § 8:30, 2A Moore's Federal Practice, 2d ed. chpt 8.

[69] Kamen Soap Prods. Co. v. Struthers Wells Corp., D.C.N.Y.1958, 159 F.Supp. 706; Karlinsky v. New York Racing Asso. (1971 SD NY) 52 F.R.D. 40; Grove Holding Corp. v. First Wisconsin Nat'l Bank of Sheboygan (1992, ED Wis) 803 F Supp 1486; C.H. Little & Co. v. Gay Apparel Corp., D.C.N.Y.1952, 108 F.Supp. 762. Also see § 1217, Wright & Miller, Federal Practice and Procedure; § 8, 2A Moore's Federal Practice, 2d ed. chpt 8; and § 62:53, Federal Procedure, Lawyer's Edition.

[70] Atwood v. humble Oil & Ref. Col, C.A.5th, 1957, 243 F.2d 885.

violated Rule 8—without assessing any of the individual claims therein—judging the book by its cover, i.e. judging the complaint by its length.

The secret to winning cases in the Southern District appears to be presenting the smaller pleading. In order to save themselves work it seems that these federal judges quite literally 'weigh' the merits of each pleading.

Conclusion

In closing, petitioner presents a broader question, less technical, but which perhaps goes more to essential issues here. That question is whether these federal rules of civil procedure mean what they say or are they subject to unpredictable and varying interpretation depending on which judge, district, or circuit receives the case, on the financial status of the plaintiff, the subject area of his claims, number of claims, number of cases on the court docket and so forth?

Petitioner can only argue here upon on the official record he has seen in this case. Petitioner is bewildered by these lower court decisions which contradict your doctrine, contradict other courts, and contract earlier decisions in these very same courts. Most important of all, these holdings contradict the actual reality of circumstances described by these lower courts. Petitioner is not privy to what goes on behind the scenes in the federal judiciary. Petitioner must necessarily presume from limited information, a belief that there are two fundamental and primary reasons for this dismissal. First, there is animus on the part of these lower federal court judges towards this plaintiff because of his *in forma pauperis pro se* status, as well as the disfavored subject area of his allegations: § 1983, civil rights, wrongful termination, and others.

The second fundamental cause appears to be that clogged dockets have heightened the workload on federal judges, and this in turn has caused heightened pleading requirements in some cases (including heightened resistance to travel to remote locations like Key West, 100 miles offshore).

Petitioner believes if most federal judges were idled by a dearth of complaints, or conversely, there were 100 times as many federal judges with the same number of complaints filed as at present, then this judge would have traveled to Key West and taken the time to make sure this *pro se* complaint received due consideration on its merits. These judges would have followed your orders in *Haines v. Kerner*, 404 U.S. 519 (1972) and *Estelle v. Gamble*, 429 U.S. 97 (1976) to closely scrutinize these *pro se* complaints with especial care to determine if some colorable claim exists.

In August of this year Attorney General Janet Reno captured the

problem succinctly in a speech saying: "Without enough judges, our laws will become empty promises, and our "swift justice" an oxymoron."

The Chief Justice and Justice Black in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) put it well in dissent:

> It is of course desirable that the congestion on court dockets be reduced in every way possible consistent with the fair administration of justice. But that laudable objective should not be sought in a way which undercuts the very purposes for which courts were created—that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties.
>
> When we allow the desire to reduce court congestion to justify the sacrifice of substantial rights of the litigants in cases like this, we attempt to promote speed in administration, which is desirable, at the expense of justice, which is indispensable to any court system worthy of its name.
>
> Moreover, it seems plain to me that any attempt to cut down on court congestion by dismissing meritorious lawsuits is doomed to fail even in its misguided purpose of promoting speed in judicial administration. Litigants with meritorious lawsuits are not likely to accept unfair rulings of that kind without exhausting all available appellate remedies. Consequently, any reduction of trial court dockets accomplished by such dismissals will be more than offset by the increased burden on appellate courts. This case seems to me an excellent example of the sort of wholly unnecessary waste of judicial resources which can result from such overzealous protection of trial court lockets. * * * The end result of the procedures adopted here has been that much time has been wasted and yet no justice has been done.

Mr. Justice Harlan said much the same, concurring in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411:

> judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

It's an old problem which requires perpetual vigilance: "here is

another instance of judicial haste which in the long run makes waste." Judge Charles E. Clark, Dioguardi v. Durning, C.A.2d, 1944, 139 F.2d 774.

If an injured citizen receives **slow** justice due to political bickering between the Senate and President, shame on them. If he receives **no** justice due to this bickering—shame on the federal courts. Give me slow justice rather than no justice.

For the foregoing reasons, this petition for Writ of Certiorari should be granted. I seek reversal, vacating the judgment below and remanding to allow the merits of my claims to be considered.[71]

Order the district court to proceed in Key West as the promulgated local federal rule prescribes, and stay the heightened pleading requirements—as this Supreme Court has previously admonished on numerous occasions. Order the Florida Southern District Court to perform its judicial duty to deal with the issues of this case in good faith and in accordance with the rule of law.



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October 14, 1997

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[71] Summary judgment is warranted on this case, based solely on this petition and the forthcoming respondents' response, considering the pronounced disregard for your announced doctrine, and disregard of clear local court rule which confers a personal venue privilege on litigants which a judge may not arbitrarily abridge.